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March 26, 2004

VIA FEDEX

Kedari Reddy
 Assistant Regional Counsel
 United States Environmental Protection Agency
 Region 2
 290 Broadway
 New York, NY 10007-1866

Re: Draft Administrative Order for the Lower Passaic River Portion of the Diamond Alkali Superfund Site

Dear Ms. Reddy:

This is a response on behalf of Pharmacia Corporation (formerly known as Monsanto Company) to the draft administrative order for the Lower Passaic River Portion of the Diamond Alkali Superfund Site ("Draft Order"), forwarded to us on behalf of Solutia, Inc. ("Solutia") by William Hyatt of Kirkpartick & Lockhart LLP on March 10, 2004. This response is being timely submitted in accordance with the March 26, 2004 deadline referenced in that correspondence.

Please be advised that the corporate entity that was known as Monsanto Company prior to March 31, 2000, is now called Pharmacia Corporation ("Pharmacia"), as a result of a name change filed on that date.¹ In 1997, pursuant to a Distribution Agreement, Pharmacia spun off its chemical business into a separate company, Solutia. As part of this transaction, assets and liabilities associated with the historic chemical business were transferred to Solutia. Generally speaking, responsibilities associated with Pharmacia's former manufacturing facility in Kearny, NJ ("Kearny Site") were among the liabilities transferred to and directly assumed by Solutia. Pursuant to the 1997 agreement, Solutia is authorized to act as Pharmacia's agent with regard to these matters.

In accordance with the above, Pharmacia indicates that at this time it is not in a position to accept or decline EPA's request to participate in the Draft Order. On December 17, 2003, Solutia and 14 of its U.S. subsidiaries filed for bankruptcy protection and reorganization under Chapter 11 of the United States Code, in the United States Bankruptcy Court for the Southern

¹ In 2000, Pharmacia created a new subsidiary to which it transferred the agricultural business of Pharmacia as it existed prior to March 31, 2000. In 2002, Pharmacia completed the spin off of this subsidiary, which has been known as Monsanto Company since March 31, 2000.

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District of New York. Solutia has taken the position that the bankruptcy filing relieves Solutia of its obligations under the 1997 Distribution Agreement, which include all obligations associated with the Kearny Site. Furthermore, on February 26, 2004, Solutia filed suit in the bankruptcy court against EPA on the grounds that the Bankruptcy Code's automatic stay provision prohibits EPA from enforcing prior environmental claims against Solutia for properties, like the Kearny Site, that Solutia neither owns nor operates. Pharmacia's responsibility, if any, for the potential environmental liabilities of Solutia, is a matter that will be determined by the federal courts having jurisdiction over specific sites and the bankruptcy court. Until these matters are addressed by the court(s), it would be premature for Pharmacia to take any position with regard to Solutia's potential environmental liabilities associated with the Draft Order.

Pharmacia's ability to respond is further frustrated by the New Jersey Department of Environmental Protection's ("NJDEP's") issuance in 2003 of Directive No. 1 In the Matter of the Lower Passaic River ("Directive"). Prior to filing its bankruptcy petition, Solutia (as attorney-in-fact for Pharmacia), responded to NJDEP and outlined its good cause defenses with regard to the Directive. A copy of that response is attached. The Directive and EPA's Draft Order contain potentially overlapping and contradictory obligations, the liability for which cannot be determined outside the context of the bankruptcy proceeding.

Pharmacia also wishes to point out that it has significant objections to the procedure employed by EPA to formulate the Draft Order. Liaison counsel for the group of companies formed in this matter ("PRP Group") does not represent Pharmacia. However, from the time Pharmacia opted not to join the PRP Group, it has been effectively cut off from timely receipt of information vital to its assessment of the process and substance of the Draft Order. In short, the negotiating process for the Draft Order has been procedurally unfair and structurally biased against Pharmacia. Pharmacia has not been afforded a good faith meaningful opportunity to participate in the process or discuss EPA's basis for its alleged liability as an individual entity. Because Pharmacia was denied meaningful participation, the process used to formulate the Draft Order lacked the candor, openness and bargaining balance necessary to make it procedurally fair and arguably violates Pharmacia's right to due process.

Moreover, Pharmacia views the Draft Order itself as substantively unfair and unreasonable for several reasons. For one, Pharmacia cannot understand EPA's justification for extending the Lower Passaic River Study Area from Newark Bay upstream 17 miles to Dundee Dam, including certain tributaries. Pharmacia has not seen any documentation to support this expansion. The Draft Order notes that the Lower Passaic is tidal, but that fact alone does not explain how contaminants from Newark Bay could be dispersed 17 miles upriver along such a narrow and meandering waterway, or into its upstream tributaries.

Pharmacia also objects to the fact that EPA assumes, without any apparent basis, that it contributed more than a de minimis amount to the portion of the Lower Passaic River encompassed by the Draft Order.

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Pharmacia also believes that EPA's failure to name certain significant parties, most notably municipalities and the Kearny Site's present owners, places an unreasonable and inequitable cost burden on the parties chosen by EPA to participate in the Draft Order.²

Additionally, Pharmacia objects to the fact that while the settlors' covenant not to sue purports to reserve their right to sue the United States for contribution under CERCLA § 113, the United States has argued in *Cooper Industries, Inc. v. Aviall Services, Inc.*, currently pending before the U.S. Supreme Court, that PRPs cannot sue for contribution under § 113 unless the government first sues them under §§ 106 or 107. The United States argues in *Aviall* that even issuance of a CERCLA § 106 administrative order does not give PRPs a right to § 113 contribution. EPA's covenant not to sue in the Draft Order states that it will neither sue nor take administrative action under §§ 106 or 107 against the settlors. As a result, under the United States' *Aviall* reasoning, the Draft Order carves out a contribution right for the settlors that is meaningless.

Finally, Pharmacia objects to other elements of the Draft Order, *e.g.*, the procedure whereby EPA's has final say on settlors' liability for cost overruns, and the scope of EPA's reservation of right.

Pharmacia makes these points to clarify some of its concerns with the procedure and substance of the Draft Order. The above do not constitute formal objections to the Draft Order. Nor do they describe the full scope of Pharmacia's position on, and objections to, the Draft Order. Notwithstanding Pharmacia's concerns, Pharmacia would welcome the opportunity to meet with EPA to discuss in good faith its position in this matter. We look forward to hearing from you.

Sincerely,



John McGahren
of LATHAM & WATKINS LLP

cc: Molly Shaffer

² Pharmacia sold the Kearny Site in December 1994 to Motor Carrier Services Corp., G.O.D., Inc., Riley Leasing Corp. and Seigles Express, Inc. Pharmacia believes that one or more of these entities is now a subsidiary of CSX Corporation.



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CERTIFIED MAIL, RETURN RECEIPT REQUESTED

November 7, 2003

John Sacco, Director
Office of Natural Resource Restoration
Natural and Historic Resources
Department of Environmental Protection
501 State Street
P.O. Box 404
Trenton, New Jersey 08625-0404

Re: In the matter of the Lower Passaic River Directive No. 1 - Natural Resource
Injury Assessment and Interim Compensatory Restoration of Natural Resource
Injury ("Directive No. 1")

Dear Mr. Sacco:

This is a response, pursuant to N.J.A.C. 7:26C-4.2(g) and (h), on behalf of Pharmacia Corporation (formerly known as Monsanto Company) to the Department's Directive No. 1, and is being timely submitted in accordance with the November 10 deadline that the Commissioner announced at his meeting with recipients of Directive No. 1 on October 24, 2003.

As explained to you in a letter dated October 21, 2003, from Monsanto Company, the corporate entity that was known as Monsanto Company (hereinafter "Old Monsanto") prior to March 31, 2000, is now called Pharmacia Corporation ("Pharmacia") as a result of a name change filed on that date. In 1997 pursuant to a Distribution Agreement, Old Monsanto spun off one of its subsidiaries, Solutia Inc. ("Solutia"), to which it transferred certain assets and liabilities associated with Old Monsanto's Chemicals Business. (Subsequently in 2000, Pharmacia - the renamed Old Monsanto - spun off its agricultural business subsidiary, which was renamed Monsanto Company). Solutia never owned or operated the Old Monsanto Kearny manufacturing plant, and it cannot be considered responsible under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. for discharges of hazardous substances from that

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plant, if there were any. Nevertheless, pursuant to the Distribution Agreement, Solutia has the responsibility to indemnify Pharmacia for certain liabilities associated with the Chemical Business conducted at the Kearny plant and is authorized to act as Pharmacia's agent with regard to such matters. Accordingly, by this letter, Solutia, on behalf of Pharmacia, indicates its willingness to negotiate in good faith with the Department for 90 days concerning Directive No. 1, as offered at the October 24 meeting.

During those negotiations, we look forward to discussing with the Department the factual basis for the Department's issuance of Directive No. 1 against Old Monsanto (now Pharmacia Corporation), including the discharges for which it is allegedly responsible and how those discharges caused any natural resource injury or damage. In addition, in the context of the negotiations, the Department will need to consider the significant legal and factual issues regarding Directive No. 1.

To date, we have identified the numerous legal and factual issues set forth below regarding Directive No. 1. If the negotiations fail, we intend to assert these issues, and any additional issues that may be identified, as good cause defenses.

1. Neither the Spill Act nor the Brownfield Act authorizes the issuance of a Directive for performance of a natural resource damage assessment or interim compensatory restoration.
2. Directive No. 1 is contrary to the provisions of the Memorandum of Agreement among NJDEP and the Federal Natural Resource Trustees concerning the Passaic River sediments.
3. Directive No. 1 deals with sediment, regarding which USEPA has begun performing or overseeing others performing an RI/FS, that is part of a CERCLA NPL Site and is preempted by CERCLA § 122(e)(6).
4. Directive No. 1 unreasonably exposes the recipients to duplicative or inconsistent obligations to the federal and state trustees that may exercise co-trusteeship over these resources.
5. Directive No. 1 unreasonably assumes that the Department, exclusively, has trusteeship over the sediments covered in the Directive and that the Department has actual management and control of the sediments.
6. Directive No. 1 for the Lower Passaic River is inconsistent with the National Contingency Plan, including 40 C.F.R. §300.615.

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7. Directive No. 1 is inconsistent with the Technical Regulations.
8. Directive No. 1 unreasonably and without basis assumes that an individual site named in the Directive has caused or contributed more than a de minimis amount, or is a contributing factor, to any damage to natural resources, despite substantial discharges from municipalities and pre-existing damage to the resources.
9. The Directive unreasonably and without basis assumes that sediment contaminated by and adjoining an individual site named in the Directive has migrated and co-mingled at significant concentrations with contaminated sediment throughout the 17 mile Study Area.
10. The Directive is invalid because DEP has not provided the Respondent adequate time to evaluate its response and therefore, reserves the right to supplement this response.

Despite these significant and substantial issues concerning Directive No. 1, which we will expand on and support with authority if negotiations fail, we are willing to meet with the Department to discuss in good faith a mutual resolution regarding natural resource damage issues raised in Directive No. 1 and in this response. We look forward to hearing from you regarding the scheduling of such a meeting.

Very truly yours,

Pharmacia Corporation
By Solutia Inc., its Attorney-in-Fact



Jeffrey N. Quinn
Senior Vice President, Secretary and General Counsel

cc: Steven C. Kany
Mary M. Shaffer
J. William Whitlock